# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 21, 2011 |
| v | No. 296271<br>Oakland Circuit Court |
| TURON MAYES,<br><br>Defendant-Appellant. | LC No. 2008-223333-FC |

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 12 to 40 years' imprisonment for the armed robbery conviction and to five years' imprisonment for the felony-firearm conviction. We affirm.

This case arises out of defendant's involvement in an armed robbery that took place at the Vintage Wine Shoppe in Novi, Michigan on January 14, 2008. Evidence was also presented at trial linking defendant to two other robberies several hours later in Wayne County, one at a Livonia Speedway and another at a 7-Eleven Store in Redford Township, and information obtained from those crimes was used to help track down defendant.[1]

## I. PREARREST DELAY

Defendant argues that he was denied a fair trial because he was prejudiced by an eight-month prearrest delay. We disagree. "A challenge to a prearrest delay implicates constitutional due process rights, which this Court reviews de novo." *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

[1] Defendant pleaded no contest to armed robbery, MCL 750.529, and was sentenced on May 28, 2008, for his conduct in Wayne County.

"Mere delay between the time of the commission of an offense and arrest is not a denial of due process." *People v Patton*, 285 Mich App 229, 236; 775 NW2d 610 (2009) (citation omitted). To merit dismissal of a charge, a prearrest delay must have resulted in actual and substantial prejudice to the defendant's right to a fair trial and the prosecution must have intended a tactical advantage. *Id*. at 237. To be substantial, the prejudice to the defendant must have meaningfully impaired his ability to defend against the charges such that the outcome of the proceedings was likely affected. *Id*. "An unsupported statement of prejudice by defense counsel is not enough." *People v Walker*, 276 Mich App 528, 546; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008). "If a defendant demonstrates prejudice, the prosecution must then persuade the court that the reason for the delay sufficiently justified whatever prejudice resulted." *Patton*, 285 Mich App at 237, citing *Cain*, 238 Mich App at 109. The need to investigate further, rather than a desire to obtain a tactical advantage, is a proper reason for a delay. *People v Adams*, 232 Mich App 128, 140; 591 NW2d 44 (1998).

In this case, defendant was arrested by the Livonia Police Department on January 15, 2008. The Novi Police Department interviewed defendant on January 17, 2008, and a criminal complaint and arrest warrant were obtained on January 18, 2008. Defendant was first arraigned for the Novi case on September 17, 2008.[2]

While there was an approximate eight-month delay between the time the Novi Police Department secured a criminal complaint and arrest warrant and the time defendant was arraigned, defendant has not demonstrated that prejudice resulted from the delay. Instead, defendant generally asserts that he was prejudiced because the delay denied him the right to timely court-appointed counsel to coordinate the cases between Wayne and Oakland Counties and to advise him of the impact of his actions in the Wayne County case on the Oakland County case. However, defendant does not provide any detail on how earlier appointment of counsel would have aided his defense. Defendant's unsupported statement of prejudice does not satisfy his burden of proving that he was actually and substantially prejudiced. Additionally, defendant does not provide any evidence on how the delay meaningfully impaired his ability to defend against the charges. Defendant does not provide any detail on the substance of any possible defense to the charges, nor does he provide any detail regarding how the Oakland County appointed counsel coordinating with the Wayne County appointed counsel could have supported a defense. By not identifying any specific prejudice, defendant has not established actual and substantial prejudice.

Defendant also argues that he was actually and substantially prejudiced by the prearrest delay because he did not receive jail credit for the time he was in custody prior to his initial

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[2] Based on our review of the record, it appears that defendant was first arraigned for the Novi case in the district court on September 17, 2008. At that time, he was serving his sentence for the Wayne County robbery. Defendant waived his right to a preliminary examination and was bound over to the circuit court on October 15, 2008. He was arraigned in the circuit court on October 23, 2008.

arraignment. However, to warrant dismissal, a prearrest delay must have resulted in actual and substantial prejudice to the defendant's right to a *fair trial*. *Patton*, 285 Mich App at 237. The lack of credit for the time defendant spent in custody prior to his arraignment has nothing to do with his right to a fair trial. Accordingly, defendant has failed to show that he was actually and substantially prejudiced by the prearrest delay.

Moreover, defendant cannot demonstrate that the delay was caused by deliberate misconduct on the part of the police or the prosecution. In defendant's standard 4 brief, he contends that the reason for the delay was for the prosecution to gain a tactical advantage, i.e., the prosecution wished to use the Wayne County conviction as MRE 404(b) evidence in the Oakland County case. However, the facts and circumstances surrounding the Wayne County conviction are properly admissible as part of the res gestae. See *People v McGraw*, 484 Mich 120, 150; 771 NW2d 655 (2009). Evidence of a defendant's other criminal acts is admissible when so blended with or connected to the crime for which the defendant is charged "that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). "[T]he principle that the jury is entitled to hear the 'complete story' ordinarily supports the admission of such evidence." *Id*. As such, the delay did not lead to a tactical advantage for the prosecution because the prosecution would have been able to elicit testimony regarding the facts and circumstances surrounding the Wayne County conviction as part of the res gestae. See *McGraw*, 484 Mich at 150. In fact, at the bench trial, the court noted that it would only consider the evidence for res gestae purposes. Accordingly, defendant has presented nothing to indicate deliberate misconduct. We hold that the prearrest delay did not violate defendant's due process rights because defendant was not actually or substantially prejudiced by the delay, and there was no evidence that the prosecution intended to gain a tactical advantage.

## II. SUPPRESSION OF INCRIMINATING STATEMENT

Defendant next argues that the trial court erred in determining that his incriminating statement, wherein he admitted to the Novi detectives that he robbed the wine shop, was made voluntarily, knowingly, and intelligently. We disagree. We review de novo a trial court's determination that a waiver was knowing, intelligent, and voluntary. *People v Tierney*, 266 Mich App 687, 707-708; 703 NW2d 204 (2005). When reviewing a trial court's determination of voluntariness, we examine the entire record and make an independent determination. *People v Shipley*, 256 Mich App 367, 372; 662 NW2d 856 (2003). But we review a trial court's factual findings for clear error and will affirm the trial court's findings unless left with a definite and firm conviction that a mistake was made. *Id*. at 372-373. Deference is given to a trial court's assessment of the weight of the evidence and the credibility of the witnesses. *Id*. at 373.

We hold that the trial court did not err in determining that defendant's incriminating statement was made voluntarily, knowingly, and intelligently. When determining whether

waiver of *Miranda*[3] rights was voluntary, knowing, and intelligent, "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *People v Daoud*, 462 Mich 621, 633-634; 614 NW2d 152 (2000), quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986). The totality of the circumstances test includes consideration of:

> [1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there as an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse. No single factor is determinative. [*Tierney*, 266 Mich App at 708.]

"[T]he prosecution has the burden of establishing a valid waiver by a preponderance of the evidence." *Daoud*, 462 Mich at 634.

Although defendant claims he was tired when he made the incriminating statements, Detective Michael Wilson testified at a *Walker*[4] hearing that prior to commencing his interview of defendant, he asked defendant several preliminary questions to determine his physical and mental state. Detective Wilson testified that defendant told him he had eaten and slept. Defendant also indicated that he "felt good" and "didn't have any mental problems." The detective further asserted that defendant appeared medically fine, and that defendant responded to the questions in a logical, cogent and relevant manner. Detective Wilson read defendant his *Miranda* rights and provided defendant with the Novi *Miranda* rights form. Defendant, without being prompted, then completed the rights form and signed his initials next to each one of the five rights on the form. According to Detective Wilson, "[defendant] understood his rights, [and] agreed to talk. . . . " Finally, Detective Wilson testified that he did not threaten defendant or make any promises to him. Defendant contends that he was compelled to talk to the detectives and make a statement because he was concerned about his pregnant niece and the detectives promised to take him to get his taxes signed so that he could obtain a refund to help his niece pay the rent. However, Detective Wilson testified that he did not offer to help defendant with his taxes.

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[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

The trial court found "that Defendant was not compelled to talk with the police, and was never oppressed, threatened, beaten or deprived of any substance." By ruling in the way that it did, the trial court clearly found Detective Wilson's testimony more credible than defendant's testimony. Considering the totality of the circumstances and giving deference to the trial court's assessment of credibility, the trial court did not err in determining that defendant's statements were made voluntarily, knowingly, and intelligently. That is, there was no evidence that defendant's decision to waive his *Miranda* rights was coerced or that he did not have the requisite level of comprehension. Thus, the trial court properly denied defendant's motion to suppress.

## III. DEFENDANT'S STANDARD 4 BRIEF

Defendant has also filed a Standard 4 brief, see Michigan Supreme Court Administrative Order 2004-06, Standard 4, in which he raises several additional issues.[5]

### A. PROSECUTORIAL MISCONDUCT

Defendant argues that his due process rights were violated because his convictions were obtained through the knowing use of perjured testimony. In general, in order to be preserved for appellate review, an issue must be raised before and addressed by the trial court. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). Because defendant did not object to the prosecutor's use of allegedly false testimony to secure his convictions at trial, this issue is unpreserved. We review unpreserved constitutional errors for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"[A] conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Michigan courts have also recognized that the prosecutor has a duty to correct false evidence. See *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). Absent proof that the prosecutor knew that trial testimony was false, reversal is unwarranted. See *id.* at 417-418. Further, claims of prosecutorial misconduct are decided case by case. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). The reviewing court examines the record and evaluates the alleged improper remarks in context. *Id.* The test is whether defendant was denied a fair and impartial trial. *Id.*

The record does not support defendant's argument that the prosecution allowed false testimony from Detective Wilson of the Novi Police Department. Specifically, the detective's testimony was simply not perjured testimony in the manner defendant asserts. At trial, Detective Wilson testified that the Vintage Wine Shoppe did not have any surveillance cameras operating at the time of the robbery; however, he testified that Cottage Inn Pizza did have an external

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[5] Defendant also argues prearrest delay and suppression issues in his standard 4 brief, discussed *supra*.

camera that was operational. He further testified that the surveillance camera from Cottage Inn Pizza monitored the pizza parlor's parking lot and also captured footage of the area behind the Vintage Wine Shoppe during the relevant time period, which police were able to use in describing what was believed to be the robbery suspect's vehicle to other agencies. Accordingly, there is nothing in the record to suggest that Detective Wilson provided false testimony regarding an "unknown camera, of some unknown robbery, by some unknown suspect" as defendant contends. We note that even if Detective Wilson provided false testimony, defendant has failed to show that the prosecution knew his testimony was false. Accordingly, we hold defendant has failed to show that there was a plain error affecting his substantial rights.

The record also does not support defendant's argument that the prosecution allowed false testimony from Livonia police officer Brian Duffany. According to defendant, Officer Duffany testified that he was given a description of the Novi robbery suspect. Defendant infers that it was impossible for the officer to be suspicious of the gold Malibu defendant was in that evening because the driver, a black male, did not match the description of the Novi suspect being a white male with blue eyes. Contrary to defendant's assertions, Officer Duffany never testified that he was given a description of the Novi robbery suspect. At trial, Officer Duffany testified that he received information that Novi police reported a robbery and that the possible suspect vehicle was a gold vehicle with a sunroof. Officer Duffany testified that he then received information that a Speedway gas station in Livonia was robbed and that the suspect was a black male. About ten minutes later, Officer Duffany received additional information that a 7-Eleven in Redford Township was robbed and the suspect was a black male. Officer Duffany testified that the suspect in both the Livonia and Redford robberies fled on foot and there was no information about a suspect vehicle. Officer Duffany never testified that he had a description of the Novi suspects; instead, the officer had a description of the suspect vehicle involved in the Novi robbery. Accordingly, Officer Duffany's testimony was not perjured as defendant asserts.

Defendant also argues that the prosecutor's statement "that the officer had a description from his pre-shift [sic] rollcall, so [that] he was on the lookout for defendants" amounted to prosecutorial misconduct because the prosecutor knew Officer Duffany's testimony was false. As noted, *supra*, defendant mischaracterizes the officer's testimony, and the testimony was not perjured as defendant asserts. Also, contrary to defendant's argument, the prosecutor did not state that Officer Duffany was on the lookout for defendants. Instead, the prosecutor stated that the officer had information about the Novi robbery suspect vehicle, that he had a description of two robberies that occurred in Livonia and Redford, and that the officer subsequently observed a gold vehicle matching the Novi robbery suspect vehicle. We hold that the prosecutor's argument constituted a proper summation of the officer's testimony and did not constitute misconduct.

## B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his counsel's failure to object to the introduction of the video footage captured by the Cottage Inn Pizza camera denied him the right to the effective assistance of counsel. Because defendant failed to move for a new trial or request an evidentiary hearing in the trial court, this issue is unpreserved. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Review of an unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A defendant has waived the issue if the record on appeal does not

support the defendant's assignments of error. *Sabin*, 242 Mich App at 659. A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact, if any, for clear error, and review the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo. *Id*.

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Aceval*, 282 Mich App at 386. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, 535 US at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant argues that defense counsel's failure to object to or question the validity of the video footage violated his right to the effective assistance of counsel. Defendant apparently asserts that the security video did not meet the proper foundational requirement and that defense counsel should have objected to its admission. MRE 901 sets forth the requirements for authentication or identification of evidence such as a security video. It provides that the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). Detective Wilson testified that while the wine shop did not have any surveillance cameras operating at the time of the robbery, Cottage Inn Pizza did have external cameras that were operational. The surveillance camera from Cottage Inn Pizza monitored the pizza parlor's parking lot and also captured footage of the area behind the Vintage Wine Shoppe. Detective Wilson also testified that video footage from this camera captured a small four-door vehicle stopped behind the wine shop minutes before the robbery. At trial, Detective Wilson testified that he recognized the exhibit admitted at trial as video footage captured by the Cottage Inn Pizza camera just before the robbery. Consequently, the video met the authenticity requirements, and any objection to its admission or validity would have been futile. Defense counsel is not ineffective for failing to make futile objections. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Further, even if defense counsel's failure to object fell below an objective standard of reasonableness under prevailing professional norms, defendant cannot establish that he was prejudiced because the erroneous admission of this evidence was not outcome determinative, i.e., defendant confessed to his participation in the Novi robbery.

Defendant also requests a remand for an evidentiary hearing to determine whether his counsel provided effective assistance. Although defendant failed to request an evidentiary hearing before the trial court, this Court may grant a motion to remand for this purpose if defendant can identify an issue for appeal that requires further development of the factual record for appellate consideration. MCR 7.211(C)(1)(a)(ii). Such a motion must be supported by an affidavit or other offer of proof. *Id*.

Here, defendant has not filed a motion to remand with this Court and has not presented evidence or an affidavit demonstrating that facts elicited during an evidentiary hearing would support his claim. Moreover, a remand is unwarranted because, as explained, *supra*, defense counsel's assistance was not ineffective.

## C. SPEEDY TRIAL

Defendant argues that he was denied the right to a speedy trial. To preserve this issue for appeal, a defendant must make a formal demand for a speedy trial on the record. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Because defendant did not make a formal demand on the record, we review this unpreserved constitutional issue for plain error that affected his substantial rights. *Carines*, 460 Mich at 763-764. Generally, the determination whether a defendant was denied a speedy trial is a mixed question of fact and law. *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). We review the trial court's factual findings for clear error and review constitutional questions de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute and court rule. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; MCR 6.004(A); *Williams*, 475 Mich at 261. In determining whether a defendant has been denied a speedy trial, a court must weigh the following relevant factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Williams*, 475 Mich at 261-262. The length of the delay is measured from "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." *United States v Marion*, 404 US 307, 320; 92 S Ct 455; 30 L Ed 2d 468 (1971).

> In assessing the reasons for delay, this Court must examine whether each period of delay is attributable to the defendant or the prosecution. "Unexplained delays are charged against the prosecution. Scheduling delays and docket congestion are also charged against the prosecution." However, "[a]lthough delays inherent in the court system, e.g., docket congestion, are technically attributable to the prosecution, they are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." [*Waclawski*, 286 Mich App at 666 (citations omitted).]

In this case, the delay between defendant's first arraignment and trial was approximately 11 months.[6] The reasons for the delay varied. Defendant was responsible for several months of the delay because he filed various motions.[7] Several more months were due to the trial court's

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[6] As indicated, defendant was first arraigned for the Novi case on September 17, 2008. A bench trial began on August 24, 2009.

[7] On January 7, 2009, defendant filed a motion requesting a *Walker* hearing. On February 4, 2009, defendant filed two motions, one requesting an evidentiary hearing and the other

schedule,[8] which is given very little weight. Regarding prejudice, because the delay was less than 18 months, the burden was on defendant to prove prejudice. See *Williams*, 475 Mich at 262. A defendant can experience two types of prejudice while awaiting trial, prejudice to his person and prejudice to the defense. *Id*. at 264. The first type results when pretrial incarceration deprives an accused of civil liberties. See *id*. The second type, which is more crucial, occurs when the delay affects a defendant's ability to adequately prepare for trial and defend his case. See *id*. Defendant does not assert he suffered any prejudice as a result of a deprivation of his civil liberties or any prejudice to his ability to adequately prepare for trial and defend his case. Instead, defendant claims he was prejudiced because (1) the prosecution gained a tactical advantage, in that it could use the Wayne County conviction as MRE 404(b) evidence in the Oakland County case, and (2) he was not given any jail credit. As noted, however, defendant's right to a fair trial was not prejudiced. His unsupported assertions of prejudice fail to establish that his ability to prepare or defend was affected by the delay. After weighing the relevant factors, we hold that defendant was not denied the right to a speedy trial.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly

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requesting the court to dismiss his charges based on a due process violation. The trial court held a *Walker* hearing on March 26, 2009, and on June, 4, 2009. On July 6, 2009, defendant filed a motion to adjourn trial. The trial court filed an order of adjournment on July 10, 2009.

[8] The initial *Walker* hearing was held on March 26, 2009. Unable to complete the examination of their witnesses at this hearing, the parties set another date for the hearing to continue. The date set was on May 7, 2009. However the judge was not available on this date. Accordingly, an order was entered for the hearing to continue on June, 4, 2009. The *Walker* hearing was concluded on June 4, 2009. The court filed its order on the issues raised in the *Walker* hearing on July 6, 2009.